2026 INSC 546

Non-reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs. …… & …… OF 2026
(@ Special Leave Petition (Civil) Nos. ..... & ..... of 2026)
(@ Diary No. 20732 of 2024)

Bhupesh Bhayana and another **Appellants**

versus

Kunal Seth and another **Respondents**

J U D G M E N T

SANJAY KUMAR, J

1. Leave granted.

2. Arbitration proceedings dating back to September, 2012, culminated in cross appeals by both parties under Section 37 of the Arbitration and Conciliation Act, 1996[1]. The common judgment dated 27.09.2023 passed in the said appeals by a Division Bench of the Delhi High Court is presently under challenge by one of the parties.

3. By order dated 10.07.2024, this Court directed the appellants to deposit ₹50,00,000/- before the High Court without prejudice to their rights and contentions. Disbursal of that amount to the respondents was made subject to the final outcome of these cases. On 05.12.2025, this Court stayed further proceedings in OMP(ENF)(COMM) No. 54 of 2024, the

[1] ... hereinafter "the Arbitration Act".

execution petition filed by the respondents before the Delhi High Court in relation to the arbitral award in question.

4. The genesis of this litigation is the agreement dated 09.04.2010 entered into by the father of appellant No.1, late Sudershan Kumar Bhayana, and his mother, Kiran Bhayana, appellant No.2, with late Vinod Seth, the father of respondent No.1 and husband of respondent No.2. This agreement entailed reconstruction of the old building belonging to the Bhayanas (for short, 'the owners') by Vinod Seth (for short, 'the builder'), whereupon he was entitled to retain the second floor without roof rights. The builder was also required to pay ₹64,00,000/- to the owners, in instalments, as earnest money and compensation.

5. Clause 7 of the agreement posited completion of the project within 12 months after providing the vacant land with a grace period of 2 more months and, thereafter, the builder had to pay penalty @ ₹10,000/- per day to the owners for the delayed period. Clause 13 provided for penalties in the event of breach of the agreement. It stated that if the owners committed breach of the agreement, they would be liable to pay double the earnest money and if the builder committed breach of the agreement, the earnest money and compensation amount would stand forfeited.

6. Out of the total sum of ₹64,00,000/- to be paid by him, the builder paid only ₹45,00,000/-, as the remaining ₹19,00,000/- was payable by him within fifteen days of laying the 4th lanter (slab) of the building, which never

came to pass. Admittedly, construction of the building was abandoned by the builder in August, 2011, after the basement, stilt and ground floors and *chajja* were built. The owners terminated the agreement on 11.11.2011.

7. Clause 6 of the agreement provided that, in case of any dispute regarding the agreement by or between the parties, the matter shall be referred to the arbitrators to be appointed by both the parties with mutual consent. The builder invoked this arbitration clause by his notice dated 26.12.2011. He then approached the Delhi High Court by way of an application under Section 9 of the Arbitration Act in OMP No. 482 of 2012. As both the parties were agreeable to their disputes being referred to an arbitrator appointed by the Court, the High Court passed order dated 21.09.2012 appointing a sole arbitrator to adjudicate their disputes. Further, as the owners expressed willingness to maintain *status quo* till the conclusion of the arbitral proceedings as regards the second floor of the building, as and when it was constructed, the High Court directed that the second floor, as and when it was constructed, should not be alienated, disposed of or dealt with, during the pendency of the arbitral proceedings, and that the same would be without prejudice to the rights and contentions of either party.

8. Upon completion of the arbitral proceedings, wherein both parties raised claims against each other, the Arbitrator passed Award dated 21.10.2013. Therein, he held that there was a clear breach of the

agreement by the builder and that the owners were entitled to payment of penalty, under Clause 7 of the agreement, @ ₹10,000/- per day from 09.04.2011, the date of expiry of the stipulated 12-month period, till 08.04.2013, i.e., for 2 years, being the likely completion period as per the owners, totalling to ₹72,00,000/-. Dealing with the counter claim of the builder, who had asserted that he had incurred huge expenses for the construction made, the Arbitrator noted that he had not filed proof of incurring expenditure of ₹36,92,400/- but the owners had not contested his claim in that regard. Further, the Arbitrator noted that the earnest money and compensation amount of ₹45,00,000/- was still lying with the owners but opined that, as damages were being awarded to them, they could not seek forfeiture of that amount. The builder was held entitled to ₹81,92,400/- (₹36,92,400+₹45,00,000). He was, however, denied interest thereon. The owners, therefore, had to pay ₹9,92,400/- to the builder.

9. Only the builder filed an application in OMP No. 1125 of 2014 before a learned Judge of the Delhi High Court, under Section 34 of the Arbitration Act, assailing the Award dated 21.10.2013. This application was disposed of by order dated 15.04.2019, whereby the award was upheld with modifications. The learned Judge noted that the builder had constructed the basement; stilt parking; ground floor and *chajja* by September, 2011, and had claimed construction costs @ ₹900/- per square foot for the basement and ₹600/- per square foot for the remaining

area. It was noted that the Arbitrator had accepted the claim of the builder in this regard and, as the owners had not challenged the award by way of an application under Section 34 of the Arbitration Act, the learned Judge held that she had no choice but to confirm the award to that extent.

10. The learned Judge noted that Clause 13 of the agreement provided for forfeiture of the earnest money and compensation for a breach by the builder but the Arbitrator had only awarded compensation under Clause 7 of the agreement. She noted that the construction continued till August, 2011, and held that the commencement date for award of compensation adopted by the Arbitrator, i.e., 09.04.2011, was without basis as it should be 09.08.2011. Further, she held that the Arbitrator erred in applying a two year-period to quantify the compensation as the agreement stipulated 12 months plus 2 months for completion of the project. The learned Judge, accordingly, modified the period for which compensation was payable as 09.08.2011 to October, 2012, when the claim statement was filed.

11. Sudershan Kumar Bhayana and Vinod Seth having expired, their legal representatives assailed the aforestated order of the learned Judge by way of separate appeals filed under Section 37 of the Arbitration Act. FAO (OS) No.132 of 2019 was filed by Bhupesh Bhayana and his mother, Kiran Bhayana, while FAO (OS) No. 204 of 2019 was filed by Kunal Seth and his mother, Sarita Seth. These appeals came to be disposed of by the impugned judgment dated 27.09.2023. Therein, a Division Bench of the

Delhi High Court noted that the learned Judge, in exercise of jurisdiction under Section 34 of the Arbitration Act, had modified the award by substituting her own decision. The Division Bench opined that this approach was fundamentally flawed, being beyond the scope of Section 34 of the Arbitration Act. The Bench noted that the award stood altered only to the extent of reducing the compensation in favour of the owners from ₹72,00,000/- to ₹42,00,000/-. The Bench was of the opinion that the learned Judge's order was unsustainable even on merits. It was noted that the appeal of the owners was only in relation to reduction of the compensation payable to them as they had, otherwise, accepted the award. However, as the owners had not adduced any evidence in proof of the actual damage suffered by them, the Bench opined that it could not concur with the view of the learned Judge that they were entitled to damages. The Bench observed that the owners had not made any categorical averment that the delay, by itself, had resulted in their suffering any damage and they had only relied upon Clause 7 of the agreement to claim the same. Noting that Clause 7 of the agreement could, at best, form a measure of damages to be awarded, the Bench observed that such damages could only be for the period of delay in the completion of construction but as the owners had terminated the agreement on 11.11.2011, prior to the expiry of the stipulated period, the owners would not be entitled to damages beyond that date. In consequence, the Bench

set aside the award of damages to the owners in totality. Only the acceptance, in part, of the builder's counter claim by the Arbitrator was upheld, as the owners had not even called it in question. The appeals were disposed of accordingly. Hence, these appeals by the owners.

12. At this stage, we may note certain crucial factual aspects. The owners did not seek setting aside of the award and accepted it in its entirety. In terms thereof, their right to enforce forfeiture of the builder's earnest money and compensation amount, under Clause 13 of the agreement, stood extinguished as the Arbitrator denied them that relief despite recording a clear finding that there was breach of the agreement by the builder. The Arbitrator had opined that damages under Clause 7 of the said agreement would suffice and did not permit the forfeiture under Clause 13 thereof, on the ground that it would amount to penalising the builder twice. It is on this reasoning that the Arbitrator had directed refund of the sum of ₹45 lakh paid by the builder. As the owners did not choose to challenge this direction of the Arbitrator and it was only the builder who sought setting aside of the Award, being aggrieved by the damages awarded to the owners, this issue stands settled and cannot be reopened.

13. Thereafter, the learned Judge who decided the builder's application under Section 34 of the Arbitration Act reduced the compensation payable by the builder to the owners, by way of her order dated 15.04.2019. She concluded that as the agreement itself allowed 12 months to complete the

construction and a further 2 months were granted as grace period, compensation would be payable to the owners only from 09.08.2011, when the construction activity was abandoned by the builder, till October, 2012, when the claim petition was filed. While so, dealing with the cross appeals filed by both parties, the Division Bench of the High Court completely reversed the view taken by the learned Judge and the Arbitrator, holding that the claim of the owners was unfounded as they had failed to adduce any evidence of the damage suffered by them and they were, therefore, disentitled to seek any compensation.

14. The power of the Courts to set aside an arbitral award in exercise of jurisdiction under Section 34 of the Arbitration Act and, thereafter, under Section 37 thereof, is circumscribed by the grounds set out in Section 34. Pertinently, a domestic arbitral award may be set aside under Section 34(2A) of the Arbitration Act if the Court finds that it is vitiated by patent illegality appearing on the face of it. As was pointed out by a Costitution Bench in ***Gayatri Balasamy vs. ISG Novasoft Technologies Limited***[2], modification and setting aside of an arbitral award have different consequences as the former alters the award while the latter annuls it. It was observed that modification would not inevitably lead to examination of the merits of the dispute and it would depend upon the extent of the

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modification made, with the ultimate object of yielding more just outcomes. It was held that denying Courts the authority to modify an award, particularly when such denial would impose significant hardship, escalate costs, and lead to unnecessary delays, would defeat the *raison d'être* of arbitration. This concern, it was noted, is particularly pronounced in India, where applications under Section 34 and appeals under Section 37 often take years to resolve. It was held that modification represents a limited, nuanced power in comparison to annulment of an award, as the latter would entail the more severe consequence of the award being voided in toto. As regards Section 37 of the Arbitration Act, it was held that the appellate jurisdiction thereunder is coterminous with and as broad as the jurisdiction of the Court under Section 34 thereof.

15. Having given our earnest consideration to the matter in the light of the above edict, we are of the opinion that the Division Bench's conclusion as to the disentitlement of the owners to damages was not correct. The agreement was executed on 09.04.2010, whereunder the builder was to complete the project within the stipulated time frame. In this regard, Clause 7 is of relevance and it reads as follows:

> '7. That the time period fixed from starting to end i.e. upto finishing upto third floor, with all easement is 12 month or earlier after providing the vacant land and a further grace period of two months can be given. After wards second party will pay Rs. 10,000/- per day as penalty to the first first party apart from what so ever the reason may be for the delayed period. …..'

16. In terms of the above clause, the crucial factor for commencement of the initial 12-month period is the date on which the vacant land is provided to the builder. However, this aspect was completely lost sight of by both the Courts that dealt with the matter. In his written statement filed before the Arbitrator, the builder asserted that the owners vacated the building one month after the agreement dated 09.04.2010 and the builder got the building demolished thereafter, which took about two months. The builder reiterated these assertions in his counter claim also. There was no rebuttal by the owners on these aspects. Even in his affidavit-in-evidence, late Sudershan Kumar Bhayana did not deny the assertions made by the builder as to the aforestated time frames. He merely stated that the 12 months with a grace period of 2 months would be with effect from 09.04.2010, the date of the agreement itself, which is contrary to what was stated in Clause 7 therein.

17. As per the time frames put forth by the builder, which remained uncontroverted, the date for commencement of the 12-month period would be 09.07.2010, when the vacant land was actually made available to him after demolition of the existing building. As the 12-month period commenced on that day and a further grace period of 2 months was allowed to him, the stipulated 14 months expired on 09.09.2011, by which date, the construction had stopped. The entitlement to penalty under Clause 7 of the agreement would, therefore, be only from 09.09.2011.

18. It is an admitted fact that the owners terminated the agreement on 11.11.2011, after the construction was stopped by the builder. Upon such termination, the builder could not have continued with the construction. Logically, after such termination, the owners also cannot seek compensation under the contractual clause which provided for payment of penalty for the 'delayed period'. It is not in dispute that the owners failed to adduce independent evidence of having suffered damage in the context of the breach on the part of the builder, either in terms of increase in construction costs or in terms of loss of revenue. That would have, perhaps, laid foundation for a claim for damages outside of and beyond Clause 7 of the agreement. In the absence thereof, their claim for penalty under Clause 7 could be only till the date of termination of the agreement, i.e., 11.11.2011. in effect, the owners' entitlement to contractual penalty under Clause 7 of the agreement would be from 09.09.2011 till 11.11.2011. At the rate of ₹10,000/- per day, they would be entitled to a sum of ₹6,30,000/- for this period of 63 days.

19. Further, when the agreement categorically stipulated timelines for the commencement and completion of the construction and the consequences that were to follow thereupon, it was not necessary for the owners to adduce evidence separately in proof of the actual damage suffered by them owing to the breach of the agreement on the part of the builder. The very fact that the contractual clause itself envisioned payment

of penalty on a day-to-day basis for the delayed period indicated that the damage suffered by the owners was implicit therein. The Division Bench was, therefore, in error in holding that the owners would be disentitled to compensation on the ground that they failed to adduce evidence separately, in proof of having suffered damage or loss. This conclusion was opposed to the explicit covenant in the agreement and cannot be accepted. Therefore, non-suiting of the owners' claim on that ground by the Division Bench was manifestly erroneous and cannot be sustained.

20. Lastly, we may note that the Arbitrator categorically held that the builder would not be entitled to any interest, despite his prayer in the counter claim for award of interest @ 12% per annum. Notably, the builder did not raise a grievance as to the denial of interest in his application filed under Section 34 of the Arbitration Act. In consequence, the learned Judge who dealt with the said application made no reference to that issue in her order dated 15.04.2019. Significantly, it was only in the appeal filed under Section 37 of the Arbitration Act, that the legal representatives of the builder voiced a prayer for grant of interest upon the counter claim amount, though no pleading was made in the body of the appeal in that regard. The Division Bench, however, did not grant them any relief insofar as the interest issue is concerned and no appeal has been preferred by the legal representatives of the builder before this Court. It is, therefore, not open to them to seek interest on the amount payable to them.

21. On the above analysis, at the cost of repetition, we find that the Award dated 21.10.2013 was patently illegal in more ways than one. The Arbitrator ought not to have denied the owners their just deserts under both the contractual clauses, viz., Clause 7 and Clause 13 of the agreement dated 09.04.2010. When the contract itself contemplated that they would be separately recompensed for the delay in construction, on the one hand, and for the breach of the agreement, on the other, under these two clauses, it was not for the Arbitrator to grant them relief only under Clause 7 and deny them the right of forfeiture under the other clause, viz., Clause 13. This being the correct construction of the agreement clauses, the contrary and inconsistent interpretation by the Arbitrator constitutes a patent illegality under Section 34(2A) of the Arbitration Act. However, despite this patent illegality writ large on the face of the award, the owners did not choose to file an application under Section 34 of the Arbitration Act in that regard. Therefore, the award attained finality insofar as this issue is concerned.

22. Further, the Arbitrator committed an error in computing the period for which penalty under Clause 7 of the agreement was payable. The wrong dates adopted by the Arbitrator in this regard were taken note of by the learned Judge exercising jurisdiction under Section 34 of the Arbitration Act, but she added to the said blunder by adopting equally erroneous dates for computing the penalty period. The Division Bench that

exercised appellate jurisdiction under Section 37 of the Arbitration Act further compounded the matter by altogether denying the entitlement of the owners to penalty under Clause 7 on the ground that they had failed to adduce evidence of actual damage suffered by them.

23. Insofar as the builder's counter claim is concerned, we may note that his entitlement to refund of the earnest money and compensation amount of ₹45,00,000/- stood confirmed, as the owners did not choose to challenge the same. The builder was also held entitled to the construction costs of ₹36,92,400/-, as his claim in that regard was never controverted by the owners. However, as regards the denial of interest upon the said sums, it was only before the Division Bench that a feeble prayer was made for award of interest, without any foundational pleading. Denial of that relief by the Division Bench is now final as no further appeal has been preferred before this Court by the respondents.

24. Though the award, being patently illegal, deserves to be set aside under Section 34(2A) of the Arbitration Act, we are of the opinion that doing so would not be in the interest of justice, given the fact that the parties have been litigating since the year 2012. Setting aside the award at this stage would mean that they would again have to start afresh. As was pointed out in ***Gayatri Balasamy*** (*supra*), when setting aside an award would impose significant hardship and lead to unnecessary delay, it would be open to the Court to modify the award within the guardrails

stipulated in the said judgment. Further, it was also held therein that this Court's power under Article 142 of the Constitution can be used to effect substantial justice between the parties instead of relegating them to a fresh round of litigation. We, therefore, exercise our power under Article 142 of the Constitution so as to give a quietus to the dispute between the parties in the light of what has been stated hereinabove.

25. In consequence, the appellants are held entitled to penalty of ₹6,30,000/- and the respondents are held entitled to refund of ₹81,92,400/-. Deducting ₹6,30,000/- payable to the appellants therefrom, the amount payable to the respondents would be ₹75,62,400/-. As a sum of ₹50,00,000/- has already been disbursed to them, pursuant to the order passed by this Court in the present appeals, the balance payable by the appellants to the respondents is ₹25,62,400/-. No interest can be claimed by either party on the amounts payable to them.

The appeals are disposed of in the aforestated terms.

Parties shall bear their own costs.

Pending applications stand disposed of.

……..J
[SANJAY KUMAR]

……..J
[K. VINOD CHANDRAN]

New Delhi;
May 26, 2026.